

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) PATRICIA THOMPSON, as Personal	)	
Representative of the Estate of	)	
MARCONIA LYNN KESSEE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CIV-19-113-SLP
	)	
(1) City of Norman, et al.,	)	
	)	
Defendants.	)	

**DEFENDANTS' UNOPPOSED MOTION AND BRIEF  
TO STAY PRETRIAL DEADLINES AND THE TRIAL DATE**

This case arises out of the death of Marconia Kessee on January 16, 2018. Plaintiff alleges that on this date, Decedent's federal constitutional rights and state laws were violated by Norman police officers, Cleveland County Sheriff's Office employees, Turn Key Health Clinics employees, Norman Regional Hospital, and Emergency Services of Oklahoma employees. Plaintiff has sued 17 different Defendants. This Motion is submitted jointly by eleven of these Defendants, including: Defendants City of Norman, Keith Humphrey, Daniel Brown, Kyle Canaan, the Cleveland County Sheriff in his official capacity, Todd Gibson, Zackery Andrews, Brian Knapp, Cody Barr, Stacy Shifflett, and Stephen Scott. No party is opposed to this Motion.

The Court entered its First Amended Scheduling Order on April 2, 2021 (Doc. 180). Pursuant to this First Amended Scheduling Order and the Local Rules, the following deadlines, hereinafter referred to generally as pretrial deadlines, are set:

July 28, 2021	Deadline to exchange marked trial exhibits
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August 2, 2021	Deadline to file Designations of deposition testimony; Motions in Limine, Requested Voir Dire, Trial Briefs, Requested Jury Instructions and Final Pretrial Report
August 9, 2021	Deadline to file response objections to Motions in Limine, Voir Dire, Trial Briefs, Requested Jury Instructions; Objections to Designation of deposition testimony and counter-designations due
August 12, 2021	Deadline to file replies in support of Motions in Limine, Voir Dire, Trial Briefs, Requested Jury Instructions
September 14, 2021	Jury Trial

The moving Defendants request that the Court stay the above identified pretrial deadlines and the trial, to be reset at a later date if necessary, for the below stated reasons.

Defendants Humphrey, Brown, Canaan, Gibson, Andrews, Knapp, Barr, Shifflett, and Scott are each current or former governmental employees, each of whom have raised the defense of qualified immunity in their Answers. Defendants Canaan and Brown filed their Motions for Summary Judgment on June 10, 2021 in which they more fully raised their qualified immunity defenses (Doc. 198-201)<sup>1</sup>. Defendants Humphrey, Gibson, Andrews, Knapp, Barr, Shifflett, and Scott will also each be filing their respective Motions for Summary Judgment soon in which they each more fully raise their qualified immunity defenses as well. As government employees who have been sued based on allegations that they violated Decedent's federal constitutional rights while performing their duties as

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<sup>1</sup>Pursuant to the First Amended Scheduling Order, dispositive motions are due July 1, 2021.

employees of either the City of Norman or the Cleveland County Sheriff's Office, they each have a right of access to the appellate courts concerning their assertion of qualified immunity. Qualified immunity is immunity from suit rather than a mere defense to liability. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Hunter v. Bryant*, 502 U.S. 224 (1991). The United States Supreme Court and the Tenth Circuit have stated that a defendant who has been denied summary judgment based on qualified immunity has the right to have that decision reviewed by an appellate court prior to trial. The defense of qualified immunity is "effectively lost if a case is erroneously permitted to go to trial." *Gallegos v. City and County of Denver*, 984 F.2d 328, 361, 62 (10th Cir. 1993), *cert. denied*, 508 U.S. 972 (internal citations omitted). This was affirmed by the Tenth Circuit in the recent cases of *Edison v. Owens*, 515 F.3d 1139, 1144 (10th Cir. 2008) and *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006).

Because qualified immunity is immunity from suit and is "effectively lost if a case is erroneously permitted to go to trial," the various pretrial related deadlines that are presently in place via the Local Rules or the First Amended Scheduling Order (Doc. 180), and the trial date, should be stayed pending resolution of the qualified immunity defenses more fully raised by Defendants Humphrey, Brown, Canaan, Gibson, Andrews, Knapp, Barr, Shifflett, and/or Scott in their already filed or soon to be filed Motions for Summary Judgment. If qualified immunity is denied to Defendants Humphrey, Brown, Canaan, Gibson, Andrews, Knapp, Barr, Shifflett, and/or Scott, such individual(s) Defendant will

very likely take an interlocutory appeal of such denial. Once such an appeal is taken, the district court is divested of jurisdiction over those claims. If Defendants Humphrey, Brown, Canaan, Gibson, Andrews, Knapp, Barr, Shifflett, and/or Scott are required to proceed forward with the preparation and submission of their marked trial exhibits which are due July 28, 2021 and/or the various pretrial filings which are due beginning August 2, 2021 while their qualified immunity defense is still being considered by the Court, they will each have effectively lost their defense of qualified immunity, a result which is contrary to case law cited above on this point.

In addition, there are 13 different Fed. R. Civ. P. 26 retained experts in this case. The parties will be filing *Daubert* Motions as to several of these experts. *Daubert* Motions are presently due July 1, 2021. Responses to these will be due July 22, 2021 and Replies will be July 29, 2021, *if* no party requests an enlargement of time to submit a Response or Reply. This means that the parties will be working to identify and exchange their marked trial exhibits at the same time they are working on their *Daubert* Replies. Given the numerous parties, numerous dispositive motions that have been or will be filed, and the numerous *Daubert* motions that are anticipated, it is not unreasonable to expect that one or more parties will ask for an enlargement of the response and reply deadlines relative to another party's dispositive motion and/or *Daubert* motion. With the deadlines presently set as they are, the parties will have to work on their various pretrial filings which are due between July 28 and August 9, 2021 while they are working on the responses and replies to the various dispositive and *Daubert* motions. In other words, Defendants Humphrey,

Brown, Canaan, Gibson, Andrews, Knapp, Barr, Shifflett, and/or Scott will be working on their pretrial filings while their qualified immunity defense is still being considered by the Court, and thus, they will each have effectively lost their defense of qualified immunity, a result which is contrary to case law cited above on this point. And, to require the Defendants who have not raised qualified immunity in their dispositive motions to proceed with submission of their pretrial filings in piecemeal fashion seems impractical. So, the stay requested herein is requested by the moving Defendants to be applicable to all parties.

For these reasons, the moving Defendants request that the Court stay the August 2, 2021 deadline to file Designations of deposition testimony, Motions in Limine, Requested Voir Dire, Trial Briefs, Requested Jury Instructions and Final Pretrial Report, and to stay the September 14, 2021 trial date, pending a resolution of the Defendants' dispositive motions, to be set at a later date if necessary.

A proposed Order is being submitted with this Motion.

Respectfully submitted,

s/ Ambre C. Gooch

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 11, 2021, I electronically transmitted this filing to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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